8-28-2014

Stilwyn, Inc. v. Rokan Corp. Respondent's Brief Dckt. 41451

IN THE SUPREME COURT OF THE STATE OF IDAHO

STILWYN, INC.,

Plaintiff-Appellant,

v.

ROKAN CORPORATION, a Delaware corporation; ROKAN FINANCIAL SERVICES, LLC, a Delaware limited liability company; ROKAN PARTNERS, A LIMITED PARTNERSHIP, an Idaho limited partnership; ROKAN PROPERTY SERVICES, LLC, an Idaho limited liability company; ROBERT A. KANTOR, individual; MICHAEL PAGE, individual; MICHAEL EDWARD PAGE TRUST; MICHAEL PAGE 2008 REVOCABLE TRUST; IDAHO FIRST BANK, an Idaho corporation; GREGORY LOVELL, individual; ANACONDA INVESTMENTS, LLC, a Delaware limited liability company; ANACONDA MANAGERS, LLC, a Delaware limited liability company; PORTFOLIO FB-IDAHO, LLC, a Delaware limited liability company; WALI INVESTMENTS, LLC, an Idaho limited liability company; DAVID WALI, individual; BRYAN FURLONG, individual; JOHN SOFRO, individual; JOHN DOES 1-20,

Defendants-Respondents.

Supreme Court Docket No. 41451-2013
Blaine County No. CV 2011-785

RESPONDENTS OPENING BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho
in and for the County of Blaine

The Honorable Jonathan Brody, District Judge, presiding.

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I. INTRODUCTION

The Plaintiff-Appellant, Stilwyn, Inc. ("Stilwyn") spends the entirety of its Appellant's Opening Brief seeking to minimize its participation in a prior matter initiated by Anaconda Investments, LLC ("Anaconda") and Portfolio FB-Idaho, LLC ("Portfolio") against the Federal Deposit Insurance Corporation ("FDIC"), which matter was adjudicated and resolved in the United States District Court for the State of Idaho (hereinafter referred to as the "Federal Case").[1] Stilwyn seeks to characterize its participation in the Federal Case as one in which it simply intervened in a declaratory judgment action between these parties. However, such representations are belied by the actual record of the proceedings in the Federal Case.

First, the Federal Case involved more than just Anaconda/Portfolio's seeking of declaratory judgment establishing its right to an interest in the subject property as it also included the FDIC's counterclaim against those same parties for slander of title involving the same parcel of real property. Second, and perhaps more significantly, the record of the proceedings also establishes that after Stilwyn voluntarily sought to intervene and subject itself to federal jurisdiction with regard to the claims at issue in the Federal Case, it was no mere bystander to those proceedings. Rather, as it acknowledged in filings made in those proceedings, Stilwyn "actively" sought to pursue its rights under a slander of title claim. (R. Vol. 2, p. 321.) However, after having interjected itself in the Federal Case and pursued its claim for slander of title,

[1] In presenting its arguments in this Respondents' Brief, it must be acknowledged, as it was below, that Idaho First Bank's position in this litigation is similarly aligned to those of these responding parties. As such, the arguments advanced by Idaho First Bank in its Respondent's Brief are joined and incorporated herein.

Stilwyn abandoned its efforts in the Federal Case and determined instead to initiate a separate litigation on the very same claim slander of title claims in the Fifth Judicial District Court for the State of Idaho (hereinafter referred to as the "State Case") against these Respondent-Defendants (hereinafter referred to as the "Page Respondents").[2]

The District Court in the State Case was not distracted by these efforts of Stilwyn to subsequently recharacterize the nature and scope of its participation in the Federal Case. The District Court properly applied the principles of claim preclusion to hold that Stilwyn was barred from asserting the very same claims in the State Case that should have been litigated by Stilwyn in Federal Case, even if they were not actually litigated by Stilwyn. This Court should conclude likewise and affirm the District Court's grant of summary judgment to the Page Respondents.

II. STATEMENT OF THE CASE

In large part, the underlying facts necessary for resolution of this matter are not in dispute. Stilwyn correctly notes, as did the District Court, that this case has its origins in the efforts of a group of private investors (the Page Respondents) through the legal entities they established (Anaconda and Portfolio) to acquire the rights to the Stilwyn loan. The Stilwyn loan, originally possessed by the First Bank of Idaho, had been put up for auction by the FDIC upon First Bank of Idaho's failure, and the Defendant-Respondent Idaho First Bank of McCall ("IFB") had been the successful bidder for the Stilwyn loan. Thereafter, the FDIC objected to the IFB's

[2] For purposes of this brief, "Page Respondents" shall refer to Michael Page, Michael Edward Page Trust, Michael Page 2008 Revocable Trust, John Sofro, Bryan Furlong, Wali Investments, LLC, David Wali, Anaconda Investments, LLC, Anaconda Managers, LLC, Portfolio FB-Idaho, LLC, Rokan Property Services, LLC, Rokan Financial Services, LLC, and Robert A. Kantor.

attempt to sell and/or assign the Stilwyn loan to Anaconda, which objection ultimately resulted in the rescission of IFB's successful bid of the Stilwyn loan. Portfolio, who had been assigned Anaconda's interest in the Stilwyn loan, along with Anaconda itself, sought to establish its rights in the Stilwyn loan by way of a declaratory judgment action against the FDIC in the Fifth Judicial District for the State of Idaho.

It is at this point in the procedural history between these parties where, although truly not in dispute, Stilwyn seeks to downplay the actual course of events which transpired between the parties. For example, at page 3 of the Appellant's Brief, Stilwyn correctly identifies the fact that the FDIC removed Anaconda/Portfolio's declaratory judgment action against it to the United States District Court for the State of Idaho. Stilwyn then proceeds to discuss the federal court's disposition of Anaconda/Portfolio's declaratory judgment claim, making no mention of the fact that upon removal the FDIC asserted a counterclaim against Anaconda/Portfolio alleging that their continued claim of an interest in the property, which secured the Stilwyn loan, gave rise to a claim for slander of title. (R. Vol. 1, pp. 147-157.) Stilwyn's acknowledgement of the FDIC's counterclaim is only casually mentioned several pages later and, despite its acknowledged presence, does not stop Stilwyn from continually characterizing the Federal Case throughout its Appellant's Brief as solely a "declaratory judgment action". (Appellant's Brief, pp. 5 & 13.)

However, the presence of the FDIC's counterclaim for slander of title cannot be overlooked. In fact, also understated by Stilwyn in its recitation of the prolonged procedural history between these parties is the fact that Stilwyn itself specifically identified the harm it would suffer as a result of Anaconda/Portfolio continued assertion of an interest in the real

property secured by the Stilwyn loan as the basis for its right to intervene in the Federal Case in the first instance. (R. Vol. 1, pp. 221-246.) Based on this assertion it made in its Motion to Intervene, the federal court granted Stilwyn's request to intervene in the proceedings as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). (R. Vol. 1, pp. 248-257.) In granting Stilwyn's motion to intervene as a matter of right, Stilwyn did not limit the scope of its participation nor did the federal court place any conditions or restrictions upon its participation in the Federal Case. (*Id.*)

Accordingly, and also unstated by Stilwyn in its recitation of the procedural history, is that upon its intervention in the Federal Case, Stilwyn actively participated in the litigation and did not limit its participation to issues solely pertaining to Ananconda/Portfolio's declaratory judgment claim against the FDIC. Rather, it also actively participated "consistent with its stated intention to pursue the slander of title claim" in the Federal Case, including the serving of written discovery on Anaconda/Portfolio as well as participating in and taking depositions of a number of witnesses. (R. Vol. 2, p. 326-328.)[3]

Significantly, it should be noted that this characterization of Stilwyn's active participation is not merely the Page Respondents casting of its actions, but rather the express representation that Stilwyn itself made to the federal court when it sought, six weeks prior to trial, to "confirm" its status as party to the slander of title claim in the Federal Case. As Stilwyn represented:

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[3] Stilwyn specifically identified the activities it took consistent with "its stated intent to pursue the slander of title claim" within its Memorandum in Support of Motion to Confirm Status As A Party to Slander of Title Counterclaim. (R. Vol. 2, pp. 327-328.)

> Stilwyn has actively pursued its rights against Anaconda under the slander of title claim, including participation in the status conference regarding that claim and setting a trial date, serving discovery requests, receiving discovery responses, noticing and taking depositions, all in preparation for the Court trial set for July 11, 2011.

(R. Vol. 2, p. 321.)

However, despite its intervention as a party in the Federal Case and its indisputable active pursuit of its rights against Anaconda under the slander of title claim, Stilwyn determined to withdraw its assertion of the slander of title claim. (R. Vol. 2, pp. 340-342.) In so doing, it did not receive any judicial approval for its purported attempt to remove its slander of title claim from the Federal Case nor did it obtain the consent of any of the parties to the Federal Case for its removal without prejudice from those proceedings. Rather, as Stilwyn acknowledges, the matter was dismissed "in its entirety" and Stilwyn made no objection to the federal court's entry of dismissal with prejudice of the Federal Case. (R. Vol. 2, pp. 344-356.)

Upon the dismissal of the Federal Case, Stilwyn initiated the present litigation in State Case seeking to assert the very same claims that it had already actively litigated in the Federal Case. (R. Vol.1, pp. 17-43.) Accordingly, on March 9, 2013, IFB filed its Motion for Summary Judgment, asserting that as a result of Stilwyn's involvement in the Federal Case, Stilwyn's claims in the State Case were barred by the doctrine of claim preclusion. (R. Vol. 2, pp. 381-383.) The remaining Page Respondents joined IFB's Motion, providing supplemental arguments specifically identifying why IFB's assertion of claim preclusion as against Stilwyn was equally applicable to them in view of their relationship to the transaction in question. (R. Vol. 2, pp. 427-429, 45-456.)

On July 23, 2013, the District Court entered its Memorandum Decision Granting Defendants' Motion for Summary Judgment, correctly holding that Stilwyn's claims in the State Case were barred under the doctrine of *res judicata* as such claims, if not actively pursued in the Federal Case by Stilwyn, should have been litigated therein. (R. Vol. 5, pp. 1091-1101.) The District Court entered its Amended Judgment dismissing all claims against all Defendants on September 12, 2013 and this appeal by Stilwyn followed.

III. ARGUMENT

A. The District Court Correctly Concluded That, Upon Stilwyn's Voluntary Determination To Intervene As a Party In The Federal Case And Active Participation Therein, Stilwyn's Claims In These Proceedings Were Barred By *Res judicata* (Claim Preclusion).

As noted above, Stilwyn begins its attack on the District Court's opinion by mischaracterizing the nature of the Federal Case and further minimizing its involvement therein all in an effort to bolster its assertion that it did not, nor was it ever compelled to, assert the claims that it seeks to present in these proceedings. However, as the foregoing procedural history demonstrates, the Federal Case was not simply a "declaratory judgment action" initiated by Anaconda/Portfolio, as the Federal Case also included the FDIC's assertion of a counterclaim alleging slander of title. Moreover, the foregoing also refutes Stilwyn's attempt to characterize its involvement in those proceedings as "simply" joining the Federal Case as an intervenor. The record demonstrated that Stilwyn voluntarily chose to intervene in the Federal Case without reservation or limitation and did so based on the express assertion that it possessed the right to intervene as a result of the Ananconda's purported wrongful claim of an interest in the real property secured by the Stilwyn loan. Moreover, the record also shows that Stilwyn further

expressly identified the intent of its intervention by requesting judicial confirmation of its status as a counter-claimant joining in the FDIC's slander of title cause of action.

Were such representations by Stilwyn of its limited nature and scope of its participation in the Federal Case of any merit, one would have to wonder what purpose Stilwyn actually had in voluntarily seeking to intervene in the Federal Case in the very first instance and why with such minimal involvement it undertook such costly activities. However, such an inquiry is just as academic as consideration of the Stilwyn's chief defense to the application of claim preclusion. Stilwyn argues at pages 12-20 that, as it was merely an intervenor to the Federal Case, there were no claims by an "opposing party" asserted against it and therefor it could not be compelled by Rule 13(a) to assert any counterclaim, compulsory or otherwise, against any party to those proceedings. This inquiry is wholly unnecessary as the record establishes without question the correctness of the District Court's ultimate holding that having chosen the Federal Case as the forum for its claims, Stilwyn cannot now reassert them in these proceedings. For this reason, the newly cited cases[4] by Stilwyn addressing the necessity of a claim by an "opposing party" is inapplicable to the present case as none of those cases address a scenario where a party intervenes as a matter of right against the assertion of certain claims and thereafter actively pursues its own interest in those proceedings as Stilwyn did in the Federal Case.

As noted above, although the original proceedings in the Federal Case involved only Anaconda/Portfolio and the FDIC, Stilwyn filed a Motion to Intervene as a matter of right

pursuant to Fed.R.Civ.P. 24(a)(2). (R. Vol. 2, pp. 221-224.) In so doing, Stilwyn expressly stated that its intervention was necessary because Anaconda/Portfolio's filing of a lis pendens had placed a cloud on the property and caused it damage. (R. Vol. 2, pp. 222.) Significantly, in seeking to intervene in the action pursuant to Fed.R.Civ.P. 24(a)(2), Stilwyn did not seek to limit its participation in the Federal Case, nor were any conditions to its intervention as a matter of right imposed by the federal court. (R. Vol. 2, pp. 248-257.)

This fact is of substantial import as it is well recognized that "[w]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985). Accordingly, the Ninth Circuit has recognized that where an intervenor is added pursuant to Fed.R.Civ.P. 24(a)(2), it enters "the suit with the status of original parties and are fully bound by all future court orders." *United States v. State of Or.*, 657 F.2d 1009, 1014 (9th Cir. 1981). As a result, "[b]y successfully intervening, a party "makes himself vulnerable to complete adjudication by the federal court of the issues in litigation between the intervener and the adverse party." *Id., quoting* 3B Moore's Federal Practice P 24.16(6), at 24-671 to 24-673 (2d ed. 1981). *See also,* 7A C. Wright & A. Miller, Federal Practice and Procedure s 1920 (1972).

Thus, Stilwyn's entire argument about the necessity of an "opposing party" in order for claim preclusion to apply in this case is without application in the context of this case. Stilwyn, by virtue of its voluntary determination to intervene as a matter of right in the Federal Case,

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[4] While Stilwyn advanced this lack of "opposing party" argument below, on appeal it seeks to bolster its position with a series of cases which were not presented to the District Court in the

placed itself in the adversarial position with the plaintiffs therein such that it not only subjected itself to whatever relief might be afforded to those plaintiffs, but also, by logical extension the consequence of any relief it either sought or could have sought in those proceedings.

Having entered the Federal Case just as if it were an original party, the record reveals that Stilwyn proceeded with the assertion that the actions of the plaintiffs therein constituted a slander of title for which it was entitled to a remedy. As Stilwyn represented to the federal court in its Motion to Confirm Status As A Party To Slander of Title Counterclaim:

> Stilwyn has actively pursued its rights against Anaconda under the slander of title claim, including participation in the status conference regarding that claim and setting a trial date, serving discovery requests, receiving discovery responses, noticing and taking depositions, all in preparation for the Court trial set for July 11, 2011.

(R. Vol. 2, pp. 321.)

Thus, an examination of the procedural history of the Federal Case conclusively establishes that not only did Stilwyn by virtue of its intervention subject itself to the jurisdiction of the federal court as if it were an original party in the Federal Case, it "actively pursued" litigation in support of its claim of slander of title. There is simply no need for a hypothetical analysis to be applied with regard to under what circumstances a party with no claims asserted against it by an "opposing party" must nonetheless assert claims or risk the bar of *res judicata*. Stilwyn inserted itself into the Federal Case, made itself subject to the plaintiffs' claims therein and, as a result, was not only compelled to assert any claims it had against those same plaintiffs,

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first instance. (Appellant's Brief, page 18-20.)

it, in fact, did so. Accordingly the District Court correctly concluded that *res judicata* applied and dismissed all claims against all Defendants.

It should be noted this conclusion is wholly in accord with the principles and purposes which underlie the application of I.R.C.P. 13(a) and the doctrine of claim preclusion. Although distinct legal principles, there is a uniformity of purpose in the requirement of I.R.C.P.13 which compels a party to a litigation to bring any claim it believes it possess against any opposing party arising from the same transaction or occurrence and the consequence imposed by the doctrine of claim preclusion resulting from a party's failure to pursue such a claim in a prior litigation.[5] *Compare Blaser v. Cameron*, 116 Idaho 453, 456, 776 P.2d 462, 465 (Ct. App. 1989) (stating that "the policy behind Rule 13(a) is to avoid multiple lawsuits between the parties to a transaction or occurrence.") and *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (recognizing that *res judicata* principles serve the fundamental purposes of the preventing repetitious litigation and the harassment of repetitive claims).

This overlapping purpose behind the identification of compulsory counterclaims and application of claim preclusion has been recognized by the federal courts. *See e.g., Publicis Commc'n v. True N. Commc'ns Inc.*, 132 F.3d 363, 365 (7th Cir. 1997) (stating "[t]he definition of a compulsory counterclaim—a claim that "arises out of the transaction or occurrence that is

[5] As a result, it should not be surprising that the interpretation of each is given a broad construction. *See Aldape v. Akins*, 105 Idaho 254, 259, 668 P.2d 130, 135 (Ct. App. 1983) (stating, "the transactional concept of a claim is broad, and that the bar of claim preclusion is similarly broad.").

the subject matter of the opposing party's claim"—mirrors the condition that triggers a defense of claim preclusion (*res judicata*) if a claim was left out of a prior suit.").

None of these principles of judicial economy or efficiency are served by permitting Stilwyn to voluntarily choose to subject itself to the jurisdiction of the court in the Federal Case without reservation, pursue its claims in the Federal Case without limitation and then abandon them in apparent favor of their pursuing them in a different forum. As the trial court recognized, Stilwyn "chose to enter the fray in the Federal Case and must live with the consequences." (R. Vol. 5 p. 1089.) The Page Respondents herein submit that the consequence of Stilwyn's decision is the complete bar of those claims in these proceedings and request that this Court affirm the District Court's grant of summary judgment to the Page Respondents.

B. The Doctrine Of *Res judicata* Is Fully Applicable To The Counterclaims That Should Have Been, And Were In Fact, Asserted In The Federal Case.

As an alternative attack upon the determination of the District Court in these proceedings, Stilwyn further argues that "this Court [has] held that the *res judicata* doctrine does not apply to the litigation of counterclaims." (Appellant's Brief at p. 20) However, in its assertion of this broad sweeping principle of law, Stilwyn overlooks that this Court's pronouncements in *Joseph v. Darrar*, 93 Idaho 762, 472 P.2d 328 (1970), upon which it relies were specifically limited to permissive counterclaims not arising out of the same transaction or occurrence and which were not actually litigated in the prior proceeding. *Id.*, 93 Idaho at 765, 472 P.2d at 331. Neither of these limitations apply in the present context, as it is clear that Stilwyn's claim for slander of title did arise under the same transaction or occurrence which was the subject of the Federal Case in

the first instance and, even if it were not considered compulsory (which by Stilwyn's wholesale intervention as a defendant, it was), was nonetheless, by Stilwyn's own admission, actively pursued by it in the Federal Case.

Stilwyn's further reliance on *Kootenai Electric Co-op., Inc. v. Lamar Corp.*, 148 Idaho 116, 219 P.3d 440 (2009) is likewise unsupportive of its attempt to excuse its active pursuit and then abandonment of its claim in the Federal Case in favor of a subsequent suit. At no point in the majority opinion in *Kootenai Electric* is there ever any discussion that a party to a litigation must await the assertion of a claim against it before it is obligated to respond with any claims it might have against that party. Rather, the majority opinion holds that Kootenai Electric Co-op ("KEC"), having determined to assert claims against a co-defendant (Lamar), was thereupon obligated to bring all claims arising out of the transaction or occurrence which was the subject of the litigation involving the two. As KEC had voluntarily chosen to actively litigate its claims against Lamar in a prior federal matter, this Court held it could not assert in subsequent state court proceedings an additional claim that it could have made but failed to pursue to finality in the prior federal case. Thus, in addition to being factually inapposite to the situation presented by Stilwyn in these proceedings, the guiding principle to be gleaned from the Court's analysis in *Kootenai Electric Co-op*, is the very same principle that the trial court below recognized here, *i.e.* that once a party determines to enter the fray and pursue its claims against a party to the litigation, it must assert all its claims or risk having those claims barred in a subsequent lawsuit.

Stilwyn's reliance upon *Joseph, supra,* and *Kootenai, supra*, avails it nothing and this Court should affirm the District Court's grant of summary judgment to the Page Respondents.

C. Even If The Declaratory Judgment Exception To *Res judicata* Were Recognized, It Would Not Apply In This Case.

Stilwyn further urges this Court to excuse it from the bar of *res judicata* by requesting that this Court recognize an exception to its application in cases where the prior suit was limited to a declaratory judgment action as proposed by the Restatement (Second) of Judgments § 33. While it is true that this Court has looked to the Restatement for guidance in matters of first impression, this Court has repeatedly stated that such use should not be considered a categorical adoption of all its provisions as each proposition advocated therein will be considered individually by this Court. *See e.g., Diamond v. Farmers Group Inc.*, 119 Idaho 146, 149, 804 P.2d 319 (1990). However, consideration of this exception is unnecessary in the context of these proceedings because Stilwyn would not be entitled to its application even if this Court were to determine it to be an appropriate exception to the otherwise proper application of *res judicata* principles.

Although Stilwyn seeks to characterize the Federal Case as one which "started and ended as a declaratory judgment action" (Appellant's Brief at p. 28), the record reveals the contrary. While it is true that the plaintiffs in the Federal Case initiated the action as one for declaratory judgment, the defendant (FDIC) responded with a counterclaim for slander of title thereby altering the character of the litigation between the parties. Upon its intervention in the Federal Case, Stilwyn did not limit its participation to solely issues concerning the adjudication of the plaintiffs' declaratory judgment but also, by its own admission, actively participated in the pursuit of the slander of title claim. Furthermore, after the federal court's adjudication of the

declaratory judgment claim, the case did not "end" as seemingly represented by Stilwyn. Rather, the Federal Case did not reach its conclusion until after the federal court had entered its Order that "the FDIC-R's slander of title claim shall be dismissed with prejudice, and this case shall be dismissed in its entirety" which order was incorporated into a Judgment entered therewith. (R. Vol. 2, pp. 349-350, 352.) The federal court subsequently entered an Amended Judgment which recognized that in addition to the dismissal of the slander of title claim its prior Memorandum Decision and Order which resolved "all other claims among the parties" remained in force. [6] (R. Vol. 2, pp. 354-355.)

Accordingly, there can be little doubt that the Federal Case was not simply one for declaratory judgment and the parties to that proceeding, Stilwyn included, certainly did not treat it as such. For this reason, Stilwyn's request that this Court consider the adoption of the declaratory judgment exception to *res judicata* should be rejected as it would be without application to it in any event.

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[6] In its Appellant's Brief, Stilwyn makes the assertion that this Amended Judgment should not be considered a "final judgment". (Appellant's Brief, page 33-36) However, there can be no question that the Federal Case acted as a dismissal with prejudice, nor does Stilwyn assert anything to the contrary. Rather Stilwyn seeks to put itself in the seemingly contradictory position of accepting the benefit of some of the provisions of the Judgment but not all. Having voluntarily intervened in the Federal Case without limitation, it must thereby accept the consequence of its complete dismissal with prejudice to include the conclusive and preclusive effect of not only "every matter offered and received to sustain or defeat the claim but also every matter which might and should have been litigated in the first suit." *Ticor, supra,* 144 Idaho at 126, 157 P.3d at 620.

D. The District Court Properly Concluded That The Page Respondents Were Entitled To Application Of The Doctrine Of *Res judicata* Based On Claim Preclusion.

Having demonstrated that the District Court properly applied the doctrine of claim preclusion to Stilwyn's attempt to reassert the me claims in the State Case, the only issue that remains is the appropriateness of the trial court's determination that claim preclusion barred the assertion of Stilwyn's claims against the Page Respondents. Interestingly, Stilwyn does not make any assertion on appeal, as it did below, that the Page Respondents were not privies to Anaconda/Portfolio such that they are not entitled to the benefits of claim preclusion in these proceedings. *See Ticor Title Co. v. Stanion*, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007) (claim preclusion applies to the same parties or their privies from the prior litigation). Rather, Stilwyn's argument in this regard is solely focused upon IFB's relationship with Ananconda/Portfolio and makes no mention of the Page Respondents. (Appellant's Brief at 32-33) Its argument in this regard is simply the extension of its previously advanced assertion that as these individuals and entities were not parties in the Federal Case they cannot be considered "opposing parties" such that Stilwyn was obligated to join these parties to the Federal Case in order to bring these claims against them. (Appellant's Brief at page 26-27)

However, it should be noted it has been held that "an unnamed party may be so closely identified with a named party as to qualify as an "opposing party" under Rule 13(a)." *Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 390 (3d Cir. 2002). In so concluding, the application of "opposing party" is interpreted broadly "for essentially the same reasons that courts have interpreted "transaction or occurrence" liberally—

to give effect to the policy rationale of judicial economy underlying Rule 13." *Transamerica Occidental Life Ins. Co.*, 292 F.3d at 391. Accordingly, "[w]here parties are functionally equivalent ..., where an unnamed party controlled the litigation, or where ... an unnamed party was the alter ego of the named party, they should be treated as opposing parties within the meaning of Rule 13." *Id.*

In this regard, the allegations of Stilwyn's own complaint against the Page Respondents, reveals that, as far as Stilwyn is concerned, these individuals are the functional equivalent of Ananconda/Portfolio, controlled the litigation involving Anaconda/Portfolio, or the alter ego of Anaconda/Portfolio. (*See,* R. Vol. 1, pp. 70-96.) While the Page Respondents denied the assertions in Stilwyn's Second Amended Complaint with respect to the alleged wrongful purposes and design of their relationships with these entities, they do not deny their direct and close relationship with Anaconda/Portfolio, whether as members, owners and/or managers. (R. Vol. 2, pp. 440-444.) Thus, Stilwyn simply cannot have it both ways. It cannot assert that these individuals have such a close connection with Anaconda/Portfolio that they should be subject to personal liability for Stilwyn's claims, but deny that they were so closely aligned that they should be considered "opposing parties" despite their non-appearance as parties in the Federal Case.

However, as noted above, Stilwyn's argument concerning the application of its "opposing party" defense does not address the facts upon which the dismissal of the claims against the Page Respondents was actually granted. (R. Vol. 5, p. 1097.) (stating "the parties here were either parties in the Federal Case or in privity with the parties in the Federal Case") Accordingly, the

record remains unrebutted on appeal, just as it was when presented to the trial court in the first instance, that these individuals derive a direct financial interest from Anaconda/Portfolio's participation in the Federal Case. (R. Vol. 2, pp. 440-444.) As the record stands unrefuted, this Court should affirm the District Court's dismissal of Stilwyn's claims against the Page Respondents on the basis of claim preclusion, regardless of any conclusion as to the interpretation of "opposing party" presently urged by Stilwyn in this case.

E. The Page Respondent's Request Attorneys Fees and Costs.

As argued in the Page Respondents' Cross-Appellants' Brief, the Page Respondents requested an award of attorney fees and costs based on Idaho Code 12-121. The trial court denied the Page Respondents' request. For the reasons advanced in the Page Respondents' Cross-Appellants' Brief, the Page Respondents assert that this conclusion was in err and not only should it be awarded attorneys fees and costs from the underlying proceeding, but the attorney fees and costs they have incurred in defending this appeal as well.

IV. CONCLUSION

Stilwyn voluntarily and with clear purpose intervened into the Federal Case between Anaconda/Portfolio. It did so based on its representation that it possessed an interest in the real property secured by the subject loan that it alleged was being harmed by Anaconda/Portfolio's continued assertion of an interest in the same real property. Its intervention was granted without limitation or condition and its status in the case became as if it were an original party to the Federal Case. Upon its intervention, it was no mere bystander and, consistent with that status as a party to the litigation, Stilwyn by its own admission "actively pursued its rights against

Anaconda under the slander of title claim." Stilwyn's voluntary decision thereafter to abandon the Federal Case in favor of pursuing it again in the instant case was done at its own peril and should not be excused from the proper application of claim preclusion to all of its claims against the Respondents generally, but certainly to the Page Respondents specifically.

Accordingly, the Page Respondents request that this Court affirm the District Court's grant of summary judgment on all of the Stilwyn's claims against the Page Respondents.

RESPECTFULLY SUBMITTED this 28th day of August, 2014.

GREENER BURKE SHOEMAKER OBERRECHT P.A.

By _____
Richard H. Greener
Thomas J. Lloyd III
Attorneys for the Page Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2014, two (2) true and correct copies of the within and foregoing instrument was served upon:

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